

AU: M.D.

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11/5/22

**CR 525.11 Aggravated possession of drugs, possession of drugs, marihuana, cocaine, L.S.D., heroin, or hashish R.C. 2925.11 (offenses committed on and after 9/13/16) [Rev. 11/5/22]**

**COMMENT**

R.C. 2925.11(B)(2)(b) provides a limited immunity from prosecution in certain violations of R.C. 2925.11 (minor drug possession up to and including a felony of the fifth degree). The Committee believes that disputes arising under R.C. 2925.11(B)(2)(b) are questions of law for the [court](#).

1. The defendant is charged with (possession) (aggravated possession) of drugs. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, and in \_\_\_\_\_ (County) (*insert other jurisdiction*), Ohio, the defendant knowingly (obtained) (used) (possessed) (*insert name of controlled substance*).

(A) ADDITIONAL ELEMENT(S): PHYSICIANS, PHARMACISTS, AND OTHER PERSONS. The state must also prove beyond a reasonable doubt that

*(Use appropriate alternative[s])*

(1) the defendant, at the time of the offense, was a/an (manufacturer) (licensed health professional authorized to prescribe drugs) (pharmacist) (owner of a pharmacy) (*specify other person*) whose conduct was not in compliance with (*describe applicable standards and/or procedures as specified by statute or regulation*);

**COMMENT**

If there is a factual issue as to whether defendant was a manufacturer, licensed health professional authorized to prescribe drugs, or pharmacist, the court should give an instruction on the applicable definition contained in R.C. 3719.01 and [R.C. 4729.01](#).

*(or)*

(2) the drug involved was an anabolic steroid and at the time of the offense the defendant was not conducting or participating in a research project approved by the United States Food and Drug Administration involving the use of an anabolic steroid;

(or)

(3) the defendant (sold) (offered for sale) (prescribed) (dispensed) (administered) an anabolic steroid that was expressly intended for administration through implants to livestock or other non-human species and that was approved for that purpose and the defendant's conduct was not in accordance with the Federal Food, Drug and Cosmetic Act.

#### COMMENT

[See State v. Nucklos](#), 121 Ohio St.3d 332, 2009-Ohio-792.

For the definitions of "manufacturer," "wholesaler," "licensed health professional authorized to prescribe drugs," and "pharmacist," see R.C. 2925.01.

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2. KNOWINGLY. OJI-CR 417.11; R.C. 2901.22(B).

3. POSSESS. "Possess" means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

#### COMMENT

R.C. 2925.01.

4. CONSTRUCTIVE POSSESSION (ADDITIONAL). Possession of a thing or substance can be either actual or constructive. Actual possession exists when the circumstances indicate that a person had a thing or substance within his/her immediate physical control. Constructive possession exists when a person was aware of the presence of a thing or substance and was able to exercise dominion and control over that thing or substance, even though that thing or substance may not have been within his/her immediate physical control. Both dominion and

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control, and whether a person was aware of a thing or substance's presence, may be established through circumstantial evidence. Thus, the state may establish constructive possession by circumstantial evidence alone.

**COMMENT**

Drawn from *State v. Bowshier*, 2d Dist. Clark No. 2008 CA 101, 2009-Ohio-638; *State v. Frye*, 3d Dist. Allen No. 1-17-30, 2018-Ohio-894.

**5. AFFIRMATIVE DEFENSE:**

(A) GENERAL. OJI-CR 417.27.

(B) OBTAINING A CONTROLLED SUBSTANCE PURSUANT TO A PRESCRIPTION.

R.C. 2925.11(B)(4).

*(Use appropriate alternative)*

(1) OFFENSES COMMITTED ON AND AFTER 6/20/97 BUT BEFORE 3/23/00.   

The defendant claims that he/she obtained the *(describe controlled substance)* pursuant to a prescription issued by a licensed health professional authorized to prescribe drugs and that the *(describe controlled substance)* was in the original container in which it was dispensed to the defendant.

*(or)*

(2) OFFENSES COMMITTED ON AND AFTER 3/23/00.   

The defendant claims that he/she obtained the *(describe controlled substance)* pursuant to a prescription issued by a licensed health care professional authorized to prescribe drugs.

**COMMENT**

The Committee believes that *State v. Nucklos*, 121 Ohio St.3d 332, 2009-Ohio-792, does not apply to obtaining a controlled substance pursuant to a prescription because it provides an excuse or justification based upon facts peculiarly within the knowledge of the accused.

(C) PERSONAL USE (POSSESSION OF A CONTROLLED SUBSTANCE CHARGED AS A FOURTH DEGREE FELONY ONLY). R.C. 2925.11(F).

The defendant claims that the (*describe controlled substance*) that gave rise to the charge of (*describe offense charged including amount of controlled substance involved*) was (in such amount) (in such form) (prepared, compounded, or mixed with substances which are not controlled substances in such a manner) (possessed in any other circumstances) as to indicate that the substance was solely for personal use.

6. ADDITIONAL FINDINGS:

(A) AMOUNT OF CONTROLLED SUBSTANCE. OJI-CR 425.25, OJI-CR 525.03 § 6; R.C. 2925.11(C)(1)(b)-(e), (2)(b)-(d), (3)(b)-(f), (4)(b)-(f), (5)(b)-(f), (6)(b)-(f), and (7)(b)-(f).

(B) PRIOR CONVICTION OF A DRUG ABUSE OFFENSE. OJI-CR 425.15; R.C. 2925.11(C)(2)(a).

COMMENT

Under R.C. 2925.11(C)(2)(a), possession of a schedule III, IV, or V drug in less than the bulk amount is a misdemeanor of the third degree. If the offender has been previously convicted of a drug abuse offense, it is a misdemeanor of the second degree. S.B. 107, effective 3/23/00, amends R.C. 2925.11(C)(2)(b)-(d) to provide that possession of a schedule III, IV, or V drug in the bulk amount is now a felony.

(C) MAJOR DRUG OFFENDER. OJI-CR 525.02 § 23; R.C. 2929.01, [R.C.](#) 2925.11(C)(1)(e), (4)(f), (5)(f), and (6)(f).

COMMENT

R.C. 2941.1410(A) provides that before an additional mandatory prison term may be imposed, the indictment, count in the indictment, or information charging the offender must contain a specification that the offender is a "major drug offender." R.C. 2941.1410(B) provides that the court, not the jury, determines the issue of whether an offender is a "major drug offender." The status as a "major drug offender" is determined by the amount of the controlled substance involved.

Major drug offender penalty enhancements, however, under R.C. 2929.14(D)(3)(b) are unconstitutional because they require judicial findings of fact not proven to a jury or admitted by a defendant. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. The Committee believes a penalty enhancement of an additional one to ten years may not be imposed upon a major drug offender because R.C. 2929.14(D)(3)(b) has been excised as unconstitutional by the Court in *Foster* and it was the only provision of the Revised Code that so provided.

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7. CONCLUSION. OJI-CR 425.01.

8. CONCLUSION WITH AFFIRMATIVE DEFENSE OF PERSONAL USE ONLY. [OJI-CR 425.03](#); R.C. 2925.11(E).

#### COMMENT

R.C. 2925.11(F) creates a specific affirmative defense of "personal use" that is applicable if the defendant is charged with drug abuse as a fourth degree felony. However, if the defendant proves the affirmative defense, it is not a complete bar to conviction and the defendant may be convicted of a fifth degree felony or a misdemeanor violation of drug abuse. The trial judge, if faced with this situation, must instruct the jury on the order of their deliberations. Because this affirmative defense is applicable only if the jury finds the additional finding of a specific amount of the controlled substance involved, the jury must be instructed that the order of their deliberations must be a determination of: (1) the basic elements of the charged offense; (2) the additional finding involving the amount of the controlled substance; and (3) the applicability of the affirmative defense of "personal use" if the additional finding is proved.

*(Use appropriate alternative)*

(A) If you find the state failed to prove beyond a reasonable doubt all the essential elements of drug abuse, your verdict must be not guilty.

*(or)*

(B) If you find the state proved beyond a reasonable doubt all the essential elements of *(describe offense charged)* you will then consider the additional finding concerning the amount of *(specify controlled substance)* involved. If you find the state failed to prove beyond a reasonable doubt that the amount of *(specify controlled substance)* involved was *(insert the amount of the controlled substance alleged as an additional finding)*, or are unable to agree, you must find the defendant guilty and specify on the additional finding verdict form the amount of the controlled substance that you agree on beyond a reasonable doubt.

*(or)*

(C) If you find the state proved beyond a reasonable doubt all the essential elements of

(*describe offense charged*), including that the amount of (*specify controlled substance involved*) was (*insert the amount of the controlled substance alleged as an additional finding*), you will then separately decide whether the substance involved was possessed solely for "personal use."

#### COMMENT

If the defendant is charged with drug abuse involving a schedule III, IV, or V controlled substance as a fourth degree felony and the jury finds the defendant proved the affirmative defense of "personal use," then the defendant is guilty of a second or third degree misdemeanor violation of drug abuse in accordance with R.C. 2925.11(C)(2) depending upon whether the defendant has a prior conviction of a drug abuse offense. An additional verdict form may be required if the prosecution offers evidence of the defendant's prior conviction of a drug abuse offense.

If the defendant is charged with drug abuse involving cocaine, L.S.D., or heroin as a fourth degree felony and the jury finds the defendant proved the affirmative defense of "personal use," then the defendant is guilty of a fifth degree felony violation of drug abuse in accordance with R.C. 2925.11(C)(4), (5), or (6).

#### (D) SAMPLE VERDICT FORMS.

#### COMMENT

The following verdict forms are to be used only in cases of fourth degree felony drug abuse charges when the defense of personal use is in issue.

##### (1) NOT GUILTY VERDICT FORM.

We, the jury, find the defendant not guilty.

##### (2) GUILTY VERDICT FORM.

We, the jury, find the defendant guilty.

##### (3) ADDITIONAL FINDING.

We, the jury, further find that the amount of the (*specify controlled substance*) was (equal to or more) (less) than (*insert amount of controlled substance alleged as an additional finding*).

(a) IF YOU FIND THAT THE AMOUNT OF CONTROLLED SUBSTANCE WAS  
EQUAL TO OR MORE THAN (*INSERT AMOUNT OF CONTROLLED*

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*SUBSTANCE ALLEGED*), THEN SEPARATELY DECIDE THE FOLLOWING:

In addition, we do further find that the (*insert name of controlled substance*) (was)

(was not) possessed solely for personal use.

9. CONCLUSION WITH LESSER INCLUDED OFFENSE. OJI-CR 425.09, OJI-CR 425.11.